

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
BARRIER OIL CORPORATION	:	DETERMINATION
for Review of a Denial, Suspension, Cancel-	:	
ation, or Revocation of a License, Permit or	:	
Registration under Article 12-A of the Tax Law.	:	

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Petitioner, Barrier Oil Corporation, 184 West Main Street, Tarrytown, New York 10591, filed a petition for review of a denial, suspension, cancellation, or revocation of a license, permit or registration under Article 12-A of the Tax Law (File No. 807303).

An expedited hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York on October 26, 1989 at 9:30 A.M. and continued on November 9, 1989. The hearing was continued at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on November 20, 1989, November 21, 1989, November 28, 1989, and concluded on November 29, 1989, with all briefs to be submitted by April 13, 1990. Petitioner appeared by Walsh, Maroney and Ponzini (Thomas W. Maroney, Esq., and Jeffrey S. Shumejda, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq., (Patricia L. Brumbaugh, Esq., of counsel).

ISSUE

Whether sufficient grounds exist to support the Division of Taxation's proposed refusals to register petitioner as either a motor fuel distributor or a diesel motor fuel distributor.

FINDINGS OF FACT

Background and Development of the Barrier Corporations

Petitioner, Barrier Oil Corporation ("Barrier"), was incorporated sometime in 1972 and has been doing business continuously since that time. Barrier's current president, Wayne Jeffers, entered the fuel oil business while still in high school, working for his father. The senior Mr. Jeffers owned a home heating oil service called Village Oil Heating which was operated on a part-time basis with a customer list of approximately 40. In 1972, with Wayne's older brother William Jeffers serving as president, Barrier purchased the assets of Village Oil and continued operating the business on a part-time basis.

Sometime between 1972 and 1979, Barrier began expanding its business by selling diesel motor fuel. Through 1975 Wayne Jeffers still worked full time in his father's construction business, operating Barrier on weekends and in the evening. In 1979, Barrier began selling motor fuel, or gasoline. Wayne Jeffers was primarily responsible for Barrier's expansion into this area. A second corporation, Barrier Gasoline Service, Inc., was formed in

September 1980 to handle the gasoline business. A third corporation, Barrier Energy Systems, Inc., formed in 1979, performed energy audits and marketed services in the fields of energy conservation and environmental protection. A fourth corporation, Easy Auto Leasing, Inc., was formed in 1984; it owned the various trucks and vehicles used by the other corporations. Until October 1988, the shares of the four corporations were owned entirely by William and Wayne Jeffers who were also the corporations' officers. Although four corporations existed, they were operated as one enterprise with common ownership of assets, property and management.

During the 1980's Barrier expanded its business by purchase of contract rights, customer lists, equipment and real property from various competitors. Barrier's first acquisition was of Premium Petroleum Products sometime in 1983. On December 30, 1986, Barrier Gas, Easy Auto Leasing and the two owners (William and Wayne Jeffers) purchased certain intangible assets (customer lists, contract rights, etc.), trucks, equipment and real estate from Cole Petroleum, Inc. for \$1,500,000.00 in cash and notes. On January 4, 1988, Barrier Gas purchased intangible assets and equipment from Century Resources Corporation for \$155,000.00 in cash. On January 11, 1988, Barrier Gas purchased intangible assets and equipment from Shore Line Motor Fuels, Inc. for \$650,000.00 in cash and notes. By December 1988, Barrier had total assets of over \$5 million, sales of over \$37 million and employed approximately 50 people.

Barrier is primarily in the business of supplying gasoline to branded gasoline service stations, supplying diesel fuel to commercial enterprises, supplying home heating oil and service to residential customers, leasing service stations to retail operators, and providing services in the area of environmental protection.

Barrier was registered by the Division of Taxation ("Division") as a distributor of motor fuels in February 1981. Effective September 1, 1982, the legal obligation to collect and remit sales taxes due on the retail sale of gasoline was shifted from service station operators to motor fuel distributors. By 1983, Wayne Jeffers learned that unregistered distributors were importing gasoline into New York and selling it to retail service stations without reporting or paying taxes due to the State. This illegal practice not only deprived the State of tax monies, it also placed severe competitive pressures on legitimate businesses like Barrier. Mr. Jeffers discovered that some of the service stations with which Barrier had contractual agreements to supply gasoline were purchasing from unregistered distributors in violation of their agreements with Barrier. In some cases, the station owners, unaware that the lower-priced gasoline was "bootlegged" into the State, accused Barrier of overcharging. Moreover, service stations not associated with Barrier were purchasing bootlegged gasoline and selling it to the ultimate consumer at a lower price than could Barrier's customers. This decreased the business of Barrier's clients and in turn hurt Barrier's business.

To combat the pressure placed on Barrier by unregistered distributors, Wayne Jeffers took action on several fronts. First, he advised Barrier's customers of his intention to take legal action against any company that violated its legal obligations to purchase its gasoline from Barrier and did in fact sue several companies for breach of contract or tortious interferences with contracts. Second, he informed government authorities, including employees of the Division, of the illegal practices he observed. Sometime in 1984 or 1985, Wayne Jeffers met with Malcolm LaMore, at that time a senior excise tax investigator with the Division, to share what he knew about illegal bootlegging practices with the Division. Mr. Jeffers agreed to allow the Division to use a service station under his control to set up a purchase of bootlegged gasoline. In addition, Wayne Jeffers published an article in the January 1985 edition of Construction News, informing members of the construction industry of the problems caused by bootlegged gasoline and advising them of ways to protect themselves against illegal practices.

As a result of his attempts to inform others of bootlegging operations and his refusal to

do business with illegal operators, Wayne Jeffers was subjected to threats and intimidation. On Easter Sunday of 1985, a building owned by Barrier was set on fire by unknown persons. Mr. Jeffers believes that this was intended to warn him against continuing his activities against illegal gasoline distributors. By this time, the Division was well aware that the evasion of motor fuel taxes was a major problem in the State, and it, along with the State Legislature and other legitimate members of the motor fuel industry, were framing legislative solutions to that problem.

### Barrier's Licensing and Registration History

In September 1984, the Division advised Barrier that it must post a surety bond in the amount of \$400,000.00. This followed a periodic review by the Division of the business operations of many registered motor fuel distributors. The bond was required primarily because Barrier did not provide the Division with a certified, unqualified financial statement. Barrier filed a petition with the State Tax Commission, requesting a stay of the bond requirement in order to allow Barrier the time necessary to provide the required statement. The Commission denied Barrier's petition and issued a decision on March 18, 1986 stating: "the requirement of a surety bond in the amount of \$400,000.00 as a condition of continued registration as a motor fuel distributor is sustained."<sup>1</sup>

Barrier did not post the required bond or provide the Division with certified financial statements. Accordingly, by letter dated June 9, 1986, Mr. Stuart Hefter, representing the Division, advised Barrier as follows:

"Your registration is being cancelled for failure to file a surety bond in the amount of \$400,000.00 as required by the New York State Tax Commission in its determination made on March 18, 1986.

As of the date of cancellation, you must surrender your registration documents by mailing them to me at the above address.

Please be advised that as of the date of cancellation, you no longer may purchase or sell motor fuel free of motor fuel tax as described in Section 410.7 of the State Tax Commission's Motor Fuel Registrations [sic]."

Wayne Jeffers denied that Barrier ever received Stuart Hefter's letter canceling Barrier's registration. Barrier's attorney moved to exclude the letter on the grounds that the copy of the letter offered in evidence was unsigned and no one testified to its mailing. It is also noted that although the letter indicates that it was sent by registered mail no proof of mailing was offered in evidence.

At this time, the responsibility for maintaining Barrier's books and records, filing tax returns, applying for the licenses and registrations which were necessary to Barrier's continued operation and other accounting and bookkeeping functions rested with William Jeffers, Barrier's president. He was assisted by Barrier's chief accountant, Frank Persaud. Mr. Persaud was hired by William Jeffers acting with the advice of Barrier's accounting firm, Arthur Young & Co.

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<sup>1</sup>Pursuant to section 306(4) of the State Administrative Procedure Act, official notice is taken of Matter of Barrier Oil Corporation (State Tax Commission, March 18, 1986).

Although Barrier's registration as a motor fuel distributor was canceled unequivocally, Barrier continued to purchase motor fuel in New Jersey and Connecticut, tax-free, and to import motor fuel into New York. Barrier timely filed motor fuel tax returns, reporting the import and sale of motor fuel in New York and paying the tax due. On each of its returns, Barrier referenced its canceled motor fuel distributor's number, M-2207.

By letter dated September 8, 1986, signed by Suzanne Cornell on behalf of the Division, Barrier was informed that the Division received information that Barrier purchased motor fuel in New Jersey for import into New York. The Division requested Barrier to remit tax due on these transactions. The letter also stated: "Our records do not show your company to be registered as a Motor Fuel Distributor in New York State.

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Please advise us if you plan to continue exporting into New York State, and if so, it will be necessary for you to apply with us for registration as a Motor Fuel Distributor."

In response to Ms. Cornell's letter, Mr. Persaud sent the Division copies of Barrier's motor fuel tax returns for the months of May and August 1986 showing tax due was paid to the State on the questioned transactions and a letter, stating: "Finally, we do plan to continue importing motor fuel into New York State; our application for re-registration will follow shortly." Mr. Persaud's letter is dated September 18, 1986.

On October 6, 1986, the Division received from Barrier an Application for a License as an Importing Transporter and/or Terminal Operator. It was signed by William Jeffers as president of Barrier. The application indicated that Barrier was, at that time, a registered distributor of motor fuel, operating under registration number M-2207. In response to the question has the applicant owned or controlled a business at the time "within the last five years when the registration as a motor fuel distributor of such other business was canceled or suspended", Barrier answered "No".

In November 1986, William Abbott, representing the Division, sent a certified letter to William Jeffers, president of Barrier, reiterating the Division's position that Barrier's continued importation of motor fuel after cancelation of its registration as a distributor was a violation of the law. The letter warned that if Barrier continued to operate as a registered motor fuel distributor the Division would enforce civil and criminal penalties as authorized by law. Finally, the letter stated: "In addition, we are notifying your out-of-state suppliers that you are not a registered motor fuel distributor and all sales must be made on a tax paid basis." The Division informed three of Barrier's out-of-state suppliers that Barrier's registration was canceled effective June 8, 1986 and stated the Division's position that any sales of motor fuel to Barrier must be on a tax paid basis. Nonetheless, Barrier continued to purchase motor fuel out of state tax-free and to import it into New York. It also continued to timely file motor fuel tax returns, paying the tax due on its imports.

The Division issued an importing transporter license to Barrier in March 1987. Its license number was T-5092.

On April 24, 1987, the Division received from Barrier an Application for Registration of a Petroleum Business under article 13-A of the Tax Law. The application was signed by Frank Persaud. The application stated that Barrier's petroleum related business activities included those of a distributor of motor fuel and those of a wholesaler. Barrier reported importing 3,926,580 gallons of gasoline and 917,405 gallons of fuel oils into New York in 1986. Finally, Barrier stated that its registration as a distributor was pending. The application states: "If pending, give date of application." To which Barrier responded, "date pending". The Division registered

Barrier as a Petroleum Business on May 1, 1987, effective from July 1, 1987.

The Division periodically publishes booklets containing a listing of registered distributors of motor fuel and licensed importing transporters and terminal operators. These booklets are sent to all license holders and registrants. The published listing for November 1, 1987 shows Barrier as a licensed importing transporter but not as a registered distributor of motor fuel.

During the approximately two-year period in which Barrier acted as a distributor of motor fuel, while not registered to do so, its trucks were observed and stopped by employees of the Division engaged in routine inspections of tanker trucks bringing gasoline into New York State. These inspections did not result in any action being brought against Barrier. In addition, the Division conducted an examination of Barrier's motor fuel tax returns for the period June 1985 through January 1988. Based on this examination, the Division determined tax due from Barrier in the amount of \$10,337.20 plus penalty and interest for a total due of \$13,888.24. A letter to this effect, dated March 28, 1988, was sent to Barrier, referencing Barrier's canceled distributor registration number M-2207. The letter made no mention of the fact that Barrier's registration was canceled in 1986. Barrier paid the total due promptly.

On July 7, 1988, the Division seized a Barrier truck and gasoline.

(a) Malcolm LaMore and another Division employee were conducting a mobile roadblock on the Major Deegan expressway. They spotted and followed a Barrier truck from the expressway to Repetti Service Station in Mount Vernon, New York.

(b) At the service station, the investigators reviewed various documents carried by the Barrier driver, including two bills of lading and a Uniform Manifest Form. The bills of lading indicated that Citgo Petroleum of Linden, New Jersey consigned two loads of gasoline totaling approximately 5,600 gallons to Barrier Oil Corporation for delivery in New York. The type of transaction was wholesale, and the license number shown for Barrier on the bills of lading was a New Jersey number. The Uniform Manifest showed the transporter of the gasoline, the firm ordering transportation and the owner of the gasoline after loading as Barrier Gasoline. The importing transporter number issued to Barrier Oil, T-5092, was listed as Barrier Gasoline's transporter license number. The distributor was shown as Citgo of Tulsa, Oklahoma with a New York State distributor number of M-2455. Mr. LaMore contacted his office to determine whether all motor fuel taxes had been paid on this gasoline. He was informed that the gasoline was purchased tax-free and that the gasoline had been imported unlawfully.

(c) The driver was allowed to unload the gasoline into Repetti's tanks. After unloading, the driver completed a delivery ticket, showing delivery to Repetti of 3,501 gallons of gasoline. On the reverse side of the delivery ticket was a printed version of a required State form: Certification of Prepayment of Sales Tax and Payment of Motor Fuel Tax (form FT-935). Portions of the form contained pre-printed information: the seller was identified as Barrier Oil Corporation; and the seller's New York State motor fuel tax registration number was shown as M-2207. Alternative statements regarding the tax status of the gasoline sold were provided. The form was to be completed by placing a check mark in a box next to the statement that applied to the transaction shown on the delivery ticket. Pre-printed check marks were placed in selected boxes; therefore, the driver's only tasks were to write in the date of the transaction, to identify the entity paying the motor fuel tax (the choices were Citgo, Amoco, Sunoco, Shorco, other, Century and Barrier), and to sign and date the form. As completed, the certification read: "I certify that: the selling price of the motor fuel delivered to the above purchaser on July 7, 1988 includes the New York State prepaid sales tax...and that the New York State prepaid sales tax...was included in my supplier's selling price, as indicated by his certification to me. I also certify that the selling price includes 8¢ per gallon New York State motor fuel tax which...my

supplier has certified to me that to his knowledge the motor fuel tax was paid by Citgo".

(d) After reviewing the delivery ticket, Mr. Lamore again contacted his office and relayed the contents of the ticket including the certification to his supervisor. He was instructed to seize the Barrier truck and the gasoline already delivered to Repetti's which he did.

(e) The driver, accompanied by the investigators, was then allowed to make a second delivery. Before completing the second delivery ticket, the driver telephoned his office. He completed the certification as before, except that he indicated that the motor fuel tax was paid by both Citgo and Barrier.

(f) The seized truck was driven by Barrier's driver to City Line Towing where it was inventoried and placed in secure storage.

On July 8, 1988, a complaint was filed against Richard S. Perdew, the Barrier truckdriver, in the City of Mount Vernon City Court, accusing Mr. Perdew of violating section 1812-b of the Tax Law, a class E felony. The complainant, Malcolm LaMore, charged that Mr. Perdew, while not registered as a motor fuel distributor, imported, or caused to be imported, into the State motor fuel for use, distribution, storage or sale in the State.

The Division commenced a proceeding in Supreme Court, Westchester County, seeking confirmation of the seizure of the Barrier truck and motor fuel. On August 18, 1988, an order was issued by Judge Aldo A. Nastasi confirming the seizure on the ground that the Division had demonstrated that it would prevail on the issue of forfeiture. By the same order, Judge Nastasi denied Barrier's motion seeking release of the seized truck and trailer.

Following seizure of the Barrier truck, Barrier entered into negotiations with the State Attorney General's Office and the Division. A formal criminal proceeding was held before Judge Barbara Gunther Zambelli in Mount Vernon City Court on September 16, 1988, with the State Attorney General's Office acting as the prosecutor. At that proceeding, Barrier Oil Corporation was substituted as the defendant in the criminal action, and the charge against Richard S. Perdew was dropped. Barrier's attorney, Thomas W. Maroney, placed the following statement on the record: "The defendant, Barrier Oil Corporation, will plead guilty to the reduced charge in full satisfaction of any and all criminal or civil actions pending or potentially pending against the defendant Corporation at this time and agree to pay the sum of \$1,000.00 in full satisfaction of it." Wayne Jeffers then admitted the factual allegations of the charge and pleaded guilty to a Class A misdemeanor. George DePico, an Associate Attorney representing the Division, was present at the criminal proceeding. The Assistant Attorney General noted Mr. Depico's presence and, in response to a statement made by Mr. Maroney regarding the return of the Barrier truck, he stated: "[Mr. DePico] will be handling the civil end of the matter, but it is correct, the Attorney General's Office is prosecuting the matter, and the truck seized as well as the gas will be returned and Mr. Maroney can make arrangements with Mr. Depico." No one at this hearing explicitly mentioned Barrier's pending application for registration as a motor fuel distributor. Mr. DePico has no recollection of discussing the matter of Barrier's registration with Mr. Maroney or Mr. Jeffers.

Wayne Jeffers and William Jeffers had significant disagreements regarding the management of the Barrier corporations. William Jeffers was reluctant to enter the motor fuel business at all, and Barrier did so only at Wayne Jeffers' urging. For the most part, Wayne Jeffers was responsible for sales, customer relations, contacts with suppliers and the expansion of the business. William Jeffers was responsible for accounting, bookkeeping, the filing of tax returns and the maintenance of the licenses and registrations necessary for Barrier to do business. By January 1988, the relationship between the brothers had reached such an impasse that William Jeffers physically moved Barrier's accounting offices to a location separate from

the other Barrier facilities. Following the seizure of the Barrier truck, Wayne Jeffers made a decision to buy his brother's shares of the jointly owned corporations. This decision resulted in an agreement, dated October 13, 1988, by which Wayne Jeffers purchased William Jeffers' entire investment in all of the related Barrier corporations. In December 1988, the operations and assets of the four corporations were merged into Barrier Oil Corporation. The Division was not informed of these corporate changes until after the commencement of this administrative proceeding.

#### Barrier's Pending Applications

Upon learning of the seizure of a Barrier truck, Wayne Jeffers took control of all licensing, registration and motor fuel tax matters which had previously been the province of William Jeffers. At Wayne Jeffers' direction, Barrier stopped purchasing motor fuel in New Jersey and Connecticut and importing it into New York. On July 12, 1988, Frank Persaud hand-delivered to the Division an Application for Registration as a Distributor of Motor Fuel. The entire application package submitted actually consisted of two applications: one application had a print date of February 1988, and one had a print date of July 1984. The older form was signed by Wayne Jeffers and is undated. The later application form was signed by Frank Persaud on July 11, 1988.

On August 25, 1988, Barrier filed an Application for Registration as a Distributor of Diesel Motor Fuel, including a consolidated financial statement for the four related Barrier corporations. This application was necessitated by changes in the legal requirements for registration of diesel motor fuel distributors which became effective on September 1, 1988. The changes in the law required changes in the Division's organizational structure and procedures. To implement the new law without causing major disruptions, the Division adopted a policy of issuing a temporary authorization to act as a distributor of diesel motor fuel to all applicants then registered who filed an application by the effective date of the new legislation. Barrier was issued a temporary authorization under this policy.

During the last week of November 1988, the Division sent letters to all applicants with existing tax liabilities. Barrier was one of these. The Division informed Barrier that it had unpaid withholding tax liabilities which would prevent processing of its application.

By letter dated November 29, 1988, the Division informed Barrier that it would be required to post a surety bond of \$2,304,000.00 as a condition of its registration. The consolidated financial statement of the four Barrier corporations was deemed to be not acceptable for purposes of making a bond determination since it did not provide information regarding the net worth of Barrier alone. Consequently, the bond requirement was determined on the basis of Barrier's statement on its application that it expected to sell or use 3,600,000 gallons of diesel motor fuel in New York, each month.

On December 19, 1988, the Division issued to Barrier a Notice of Proposed Refusal to Register as a Distributor of Motor Fuel based upon two grounds: (1) that Barrier had not responded to earlier communications regarding unpaid withholding tax liabilities and (2) that Barrier had not filed the required surety bond. With this notice, the Division enclosed a 90-day extension of Barrier's temporary authorization.

By the end of December 1988, Frank Persaud, on behalf of Barrier, provided the Division with proof that the withholding tax liability was satisfied. Moreover, it established that the monthly gallonage figure shown on its application was, in fact, a projected annual figure. Based on information provided by Mr. Persaud, the Division made a finding that no bond was required. By letter dated December 22, 1988, the Division advised Barrier to

disregard the letter of November 29, 1988 requiring a \$2,304,000.00 surety bond. Barrier was not issued a permanent authorization at this time, however. Instead, the Division issued a series of temporary authorizations which effectively extended Barrier's authority through May 20, 1989, pending processing of Barrier's application.

By letter dated February 27, 1989, Wayne Jeffers informed the Division that Barrier had ceased importing petroleum into New York in August 1988 and had no plans to import in the future. Barrier requested rescission of its registration as a petroleum business as soon as possible. Enclosed with this letter was a copy of a letter Barrier sent to all of its suppliers, informing them that as of February 27, 1989 Barrier ceased to be an importer of petroleum products into New York. The letter advised the suppliers that Barrier was "rescinding any resale certificate that you have on file from us as they are no longer valid or applicable. Accordingly, you should now charge us gross receipts tax on all our purchases of petroleum."

In response to Wayne Jeffers' letter, the Division asked Barrier to file returns for 1988 and for the period January 1, 1989 through February 28, 1989. The returns were received on March 15, 1989, but they were filed without remittance of the tax shown as due. The Division issued notices and demands for the unpaid taxes. Barrier submitted a payment of \$25,000.00 and entered into a deferred payment agreement for the balance.<sup>2</sup>

Upon receipt of Barrier's application for registration as a motor fuel distributor in July 1988, a copy of the application was forwarded to the Tax Enforcement Unit for its review and recommendation. By memo dated August 1, 1988, the Tax Enforcement Unit recommended denial, essentially on the ground that Barrier continued importing gasoline into New York for a period of two years after its registration was canceled.

The next documented action taken on Barrier's application was in December 1988. The Division calculated a bond requirement of \$2,262,000.00 based upon an analysis of Barrier's motor fuel returns for the period January 1986 through November 1988 and the combined financial statement submitted by Barrier in its application for registration as a diesel fuel distributor. No action was taken on Barrier's application at this time.

By memo dated March 23, 1989, the head of the unit in charge of licensing and registration requested an opinion of counsel regarding Barrier's application.<sup>3</sup> In essence, the Division's Counsel was asked whether an application for registration could be denied on the ground that the applicant imported motor fuel into New York while unregistered, if, as here, the applicant had filed all required motor fuel returns, paying the tax shown as due and "the Department failed to take action during the lengthy period for which the returns were filed." It was the opinion of counsel that registration might be denied under these circumstances. Accordingly, on May 4, 1989, the Division issued to Barrier two notices of proposed refusal to

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<sup>2</sup>At the outset of this administrative hearing, the Division asserted Barrier's failure to pay taxes due under article 13-A of the Tax Law as a ground for refusing to register Barrier as a distributor. Upon learning of the deferred payment agreement, the Division's attorney withdrew the allegation of nonpayment.

<sup>3</sup>The memorandum of the unit head discussed two other applicants who operated as motor fuel distributors, while not registered. The names of those applicants were redacted. Barrier made several requests for information regarding the other applicants, including a Freedom of Information request, which were denied.



register as a distributor. The notices were identical except that one applied to registration as a distributor of motor fuel and one applied to registration as a distributor of diesel fuel. The basis for the denials was set forth as follows:

"A review of our records shows that your registration as a distributor of motor fuel was cancelled July 1, 1986 and that you continued to import motor fuel into New York State without being properly registered after that date.

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This proposed denial is based upon section 283.2(g) and section 283.4 of the Motor Fuel Tax Law."

In lieu of a formal answer to Barrier's petition in this matter, the Division sent a letter to Barrier's attorney, dated September 29, 1989, elaborating on the Division's position with regard to the denials of registration and interposing a third ground for denial: "Conviction of a crime under the Tax Law within the preceding five years (§ 282.2[c])."

#### SUMMARY OF THE PARTIES' POSITIONS

Wayne Jeffers testified to his belief that Barrier was in full compliance with the Tax Law until the Barrier truck was seized in July 1988. It was his understanding that after its registration was canceled Barrier was purchasing gasoline in New Jersey and Connecticut and paying the applicable motor fuel and sales taxes to its out-of-state suppliers. He pointed to the letter of William Abbott as the basis of his belief that Barrier could continue to import motor fuel into New York if it paid the required New York taxes to its out-of-state suppliers. Wayne Jeffers was provided with monthly summaries of Barrier's expenses which showed payments of motor fuel taxes. These summaries were adequate to inform Mr. Jeffers that all taxes were being paid; however, they did not indicate whether the tax was being paid to Barrier's suppliers or directly to the Division. It was his understanding that Barrier's accounting firm reviewed Barrier's compliance with all Federal, State and local licensing and registration laws and discovered no problems in these areas. Furthermore, Wayne Jeffers was informed by Mr. Persaud that Barrier had filed a reapplication for registration as a motor fuel distributor in 1986 and that Barrier's application was pending. Mr. Jeffers testified to his belief that Barrier mistakenly filed an application for a license as an importing transporter, believing it to be an application for registration as a distributor. He did not state the basis for this belief.

Wayne Jeffers had reason to believe that the Division knew of Barrier's continued operation. Mr. Jeffers was personally acquainted with Mr. LaMore, and he knew that the Division conducted roadblocks as one means of enforcing the motor fuel tax law. Barrier trucks openly carried motor fuel along routes observed by the Division's inspectors, and its trucks were stopped and inspected on several occasions. Barrier's tax returns were audited by the Division. Barrier was issued an importing transporter license and registered as a petroleum business in the period after its registration as a motor fuel distributor was canceled. Based on these facts, Mr. Jeffers believed Barrier was operating in compliance with the Tax Law.

Barrier is able to continue operating as a wholesale supplier of motor fuel without registration as a distributor. It cannot, however, import motor fuel into New York, which means it must purchase all of its motor fuel at New York terminals. This increases Barrier's costs and decreases its ability to compete with other motor fuel wholesalers. Barrier's situation with respect to diesel motor fuel is somewhat different. Without registration as a diesel motor fuel distributor, Barrier cannot import or sell diesel fuel in New York. Very obviously, if sustained,

the Division's refusal to register Barrier as a motor fuel or diesel motor fuel distributor will have severe economic consequences on Barrier, on Barrier's employees and on Wayne Jeffers personally.

Barrier's long-term debt as of December 31, 1988 consisted of the following:

Connecticut Bank & Trust Co.	
Due June 1992	\$ 843,862.00
Due March 1993	770,370.00
Line of Credit	400,000.00
Loan Payable - officer	200,000.00
Equipment loans	<u>16,206.00</u>
	\$2,230,438.00

Based on information submitted by Barrier at hearing and on its applications, the Division recalculated the bond which would be required if Barrier were registered as a motor fuel distributor. Barrier's application for registration as a motor fuel distributor showed expected sales of gasoline of 2,500,000 to 3,000,000 gallons per month. The Division calculated a maximum six-month tax liability of \$2,610,000 by projecting 3,000,000 gallons over six months (apparently, on the assumption that all motor fuel sold in New York would come from imports) and multiplying the result by a combination of the motor fuel tax and the prepaid sales tax per gallon. Barrier's net worth as shown on its 1988 financial statement was \$1,157,580.00. The Division subtracted 80 percent of this amount (\$926,064.00) from Barrier's potential six-month tax liability to determine a bond requirement of \$1,683,936.00.

Barrier calculated its bond requirement differently. The Division's analysis of Barrier's motor fuel returns for the period January 1, 1986 through October 1988 established that Barrier imported approximately 26 percent of the total number of gallons it sold in New York (see Finding of Fact "34"). Based on this, Barrier determined that its potential six-month tax liability was 26 percent of total gallons sold or \$678,600.00 (.26 x \$2,610,000.00), an amount which is less than 80 percent of Barrier's net worth. Barrier's calculations would result in a minimum bond requirement of \$50,000.00.

### CONCLUSIONS OF LAW

A. Since 1929, the State of New York has imposed a tax on motor fuels (L 1929, ch 364). In addition, the retail sale of motor fuel is subject to the sales tax imposed on all receipts from the sale of tangible personal property by Tax Law § 1105(a). Prior to September 1, 1982, sales tax on motor fuel was imposed and required to be collected on each gallon of gasoline sold at retail service stations (Tax Law § 1111[former (d), (e)]). The tax was imposed at the combined state and local rate, if any, which was applied to the actual selling price. The individual retail service station was thus required to collect and remit the tax.

Tax Law former § 284(1) imposed "an excise tax of four cents per gallon upon motor fuel sold within the state by a distributor". As pertinent here, a distributor was defined as "any person, firm, association or corporation who or which imports or causes to be imported into the state, for use, distribution or sale within the state, any motor fuel" (Tax Law § 282). The former State Tax Commission was authorized to require a distributor to file a surety bond to secure the payment of all taxes due under article 12-A (Tax Law former § 283). This was the state of the law when Barrier was registered as a distributor of motor fuel in 1981.

Beginning September 1, 1982, the retail sales tax on motor fuel was collected on sales by distributors to non-distributors (L 1982, chs 454 and 469). The 1982 legislation was aimed at

protecting State and local revenue from evasion of taxes. Partly because it allowed distributors to buy and sell motor fuel to each other tax-free (see, 20 NYCRR former 410.7), this enactment proved inadequate to detect and deter tax evasion with respect to motor fuel taxes and sales taxes on motor fuel. To combat tax evasion in the motor fuel industry, the Legislature enacted what has been called the "First Import Act" (L 1985, ch 44). The Memorandum in Support of Chapter 44 discussed the large revenue loss caused by evasion of the taxes on motor fuel:

"This bill is aimed at deterring tax evasion with respect to motor fuel sold in this State. This evasion has promoted unfair competition and erosion of the State and local tax bases for which the Governor's Task Force on Administration of Taxes on Petroleum Products and Businesses estimates an annual State local loss of at least \$90 million. Industry estimates of the combined State and local revenue loss range as high as \$200 million annually." (Memorandum in Support, Governor's Bill Jacket, L 1985, ch 44).

Two methods of tax evasion were identified: (1) daisy chain schemes obfuscated liability for payment of the taxes due by setting up multiple tax-free sales of motor fuel between distributors, with the taxable event being the sale of motor fuel by a non-existent or insolvent distributor, and (2) bootlegging schemes simply involved the evasion of tax by failing to report the import and sale of motor fuel (see, Memorandum of James J. Lack, 1985 NY Legis Ann, at 55). The First Import Law (L 1985, ch 44) enhanced the enforcement of the motor fuel and sales tax laws through several complimentary strategies. Tax Law § 284 was amended to impose the excise tax upon motor fuel imported into New York, thus establishing the taxable event as the first import rather than the first sale in New York and effectively eliminating tax-free sales between distributors (see, Memorandum in Support, Governor's Bill Jacket, L 1985, ch 44). Motor fuel distributors were required to prepay the sales taxes imposed under articles 28 and 29 of the Tax Law upon importation (Tax Law § 1102). The bill amended section 283 of the Tax Law by providing grounds upon which the Division may refuse to grant registration as a motor fuel distributor or may cancel or suspend registration (Tax Law § 283[2], [4]). In addition, section 283 was amended to require the filing of a surety bond in an amount adequate to secure the payment of motor fuel and sales taxes. In 1986, clarifying and technical changes were made to the First Import Law to enhance the enforcement of the tax imposition and collection scheme put into place by the earlier legislation (L 1986, ch 276; Memorandum in Support, Governor's Bill Jacket, supra).

B. Subdivisions (2) and (4) of Tax Law § 283, enumerate certain acts the Division must consider upon its review of an application for registration as a motor fuel distributor. Tax Law § 282-a(2), as pertinent here, provides that all of the provisions of section 283 apply as well to applicants for registration as a diesel motor fuel distributor. Pursuant to Tax Law § 283(2)(c), the Division may refuse to register an applicant convicted of a Tax Law crime within five years of its application. The Division may also refuse to register an applicant whose distributor registration was canceled or suspended under Tax Law § 283(4) within the preceding five years (Tax Law § 283[2][f]) or an applicant who has committed any of the acts specified in Tax Law § 283(4) within the preceding five years. Among the acts specified in section 283(4) as grounds for cancelation or suspension of a registration are (1) the failure to file a bond or other security when required, and (2) the failure to comply with any of the provisions of article 12-A or of article 28 as it applies to motor fuel.

C. Barrier argues that, as a matter of law, the Division is precluded from using its criminal conviction as the basis for a refusal to register. Its argument is premised on the statement made by its attorney at the sentencing proceeding which took place on September 16, 1988.

The legal principles governing the effect of plea bargain agreements in administrative

proceedings are enunciated in Chaipis v. State Liq. Auth. (44 NY2d 57; see also, Matter of Raymond Dellacqua, Tax Appeals Tribunal, March 2, 1989). The Chaipis court recognized as self-evident the principle that a guilty plea must be voluntary and made with full knowledge of the consequences of the plea and stated, as a corollary to this principle, that it is the obligation of prosecutors not to retract promises made to a criminal defendant in return for a plea of guilty. With regard to the effect of prosecutorial representations on agencies outside the criminal justice system, the court found that:

"an earlier promise made by a prosecutor, an agent of the State, must be treated as a highly significant factor when the State agency with the power to enforce the promise is called upon to do so. The mere fact that an agent of the State made a representation to a criminal defendant and the defendant then pleaded guilty, assertedly in reliance on the representation, is entitled to weight." (Chaipis v. State Liq. Auth., supra at 64-65).

Barrier contends that in its case the Division is bound by the representations made at the sentencing proceeding because a Division attorney was present at those proceedings as a representative of the State Tax Commission and, in effect, stipulated that Barrier's guilty plea would not be used against it in any later licensing or registration proceedings.

A stipulation made between counsel in open court is the equivalent of a contract (Stein v. Severino, 41 Misc 2d 209, 245 NYS2d 634). It is to be construed in accordance with the intent of the parties subject to the general rules of contract construction (Baumis v. General Motors Corp., 117 AD2d 884, 499 NYS2d 227, 228). A focal point of the inquiry must be the objective of the contract and the purposes of the parties (Dunleavy v. First American Title Insurance Company of New York, 117 AD2d 952, 499 NYS2d 264). Any ambiguity in the stipulation must be construed against the party whose attorney prepared it (Matter of Mintzer, 29 AD2d 792, 286 NYS2d 879).

The exact words Barrier relies on are these: "The defendant, Barrier Oil Corporation, will plead guilty to the reduced charge in full satisfaction of any and all criminal and civil actions pending or potentially pending against the defendant Corporation at this time and agree to pay the sum of \$1,000.00 in full satisfaction of it." Contrary to Barrier's contentions, the underlined phrase does not express a clear intent to preclude the Division from considering the criminal conviction when reviewing Barrier's application for registration as a distributor. In the context of the entire proceeding, the agreement appears to relate only to the pending criminal charge and to the seizure and forfeiture action then pending against Barrier. Certainly, Barrier's attorney could not expect to bind the Division by placing an ambiguous and overly broad statement in the record. Moreover, Barrier presented no evidence other than this statement to show that either the prosecutor or the attorney representing the Division agreed that the plea agreement would encompass licensing and registration matters. In the absence of such an agreement, there is no need to determine the proper weight to be given the guilty plea.

D. If the Division is not precluded from refusing to register Barrier on the basis of its criminal conviction, neither is it required to deny registration on that basis. Tax Law § 283 specifies those acts which the Division may consider in exercising its discretionary authority to register motor fuel distributors. It does not direct the Division to refuse to register on those grounds. The Division's power to register or to refuse to register motor fuel distributors, to suspend or cancel that registration or to reinstate the enjoyment of the rights granted by registration are nonseverable parts of its discretionary licensing authority. Generally, a licensing agency's discretion must be exercised in conformity with the express or clearly implied purpose of the licensing law (Matter of Bologno v. O'Connell, 7 NY2d 155, 196 NYS2d 90). The licensing authority may not deny a license on grounds which under the applicable statute are not to be considered or upon a ground which is not supported by the

evidence (Matter of Maytum v. Nelson, 53 AD2d 221, 385 NYS2d 654, 658).

Barrier concedes that it continued to import motor fuel into New York after cancellation of its registration as a distributor. It argues that, when this fact is weighed against its history of timely filing and payment of motor fuel and all other taxes, its cooperation with the Division in attempting to prevent gasoline bootlegging, the recent changes in its corporate structure, the confusing and allegedly contradictory communications it received from the Division and the intent of the legislation imposing the registration requirements, a blanket refusal to license Barrier as either a diesel motor fuel or motor fuel distributor is an excessive penalty.

In reviewing the licensing decisions of administrative agencies, the courts are confined to questions of whether the determination is supported by substantial evidence and whether the decision under review amounts to an abuse of the agency's discretion (CPLR § 7803[3], [4]; Pell v. Board of Education, 34 NY2d 222, 356 NYS2d 833). The review of a decision of the Division of Taxation by the Division of Tax Appeals is not as limited as that of an appellate court (see, Matter of Harry W. Wallace, Tax Appeals Tribunal, October 5, 1989; Matter of Harold Small, Tax Appeals Tribunal, August 11, 1988). However, standards applied by the courts in determining whether an abuse of discretion has occurred in the context of a licensing determination are useful in weighing the arguments presented by the parties here. Where the grounds for denial of a license are clearly proven, as they were here, the test used by the courts to determine whether an agency has abused its discretion is whether the penalty imposed upon the licensee is so disproportionate to the misconduct, in light of all of the circumstances presented, as to be shocking to one's sense of fairness (see, Matter of Pell v. Board of Educ., supra). The Pell court elaborated on this standard.

"Of course, terminology like 'shocking to one's sense of fairness' reflects a purely subjective response to the situation presented and is hardly satisfactory. Yet its usage has persisted for many years and through many cases. Obviously, such language reflects difficulty in articulating an objective standard. But this is not unusual in the common-law process until, by the impact of sufficient instances, a more analytical and articulated standard evolves. The process must in any event be evolutionary. At this time, it may be ventured that a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved." (Matter of Pell v. Board of Educ., supra at 234.)

E. With the Pell court's opinion acting as guidance, it is found that refusal to register Barrier as a motor fuel distributor is an appropriate sanction in light of all of the circumstances presented.

Wayne Jeffers testified that until a Barrier truck was seized in July 1988 he believed that Barrier was in full compliance with the Tax Law. This belief was based on representations made to him by his accountant, Frank Persaud, and his accounting firm; Barrier's interactions and communications with the Division; and Mr. Jeffers' personal knowledge of Barrier's operations. Much of Mr. Jeffers' testimony was credible. It is possible that he believed that Barrier was in total compliance with the Tax Law, but his subjective knowledge and beliefs are not sufficient to justify Barrier's conduct. The real issue here is whether Barrier knew or should have known that it was operating in contravention of the law.

F. Barrier knew that its registration as a distributor of motor fuel was canceled. Even if it did not receive Mr. Hefter's letter announcing that cancelation, it did receive other communications to that effect. Suzanne Cornell's letter stated that Barrier was not registered as a distributor, and Mr. Persaud's response dated September 18, 1986, acknowledged Barrier's awareness of this fact. Mr. Abbott's letter of November 1986 warned Barrier to stop acting as a distributor of motor fuel and threatened criminal and civil action if it continued to do so. On April 24, 1987, Barrier filed an application for registration as a petroleum business under article 13-A, stating that its registration as a motor fuel distributor was "pending".

It was not reasonable for Barrier to believe that its importing transporter license was in fact a registration as a motor fuel distributor; furthermore, the record does not support a conclusion that Barrier or its employees or officers entertained such a belief. An importing transporter is "any transporter who or which transports, motor fuel in the state where such motor fuel is being imported into the state for use, distribution, storage or sale in the state" (Tax Law § 282[12]). The licensing requirement for importing transporters was imposed in 1986 (L 1986, ch 276, § 3, eff July 14, 1986). The Division was directed to take those steps necessary to license all applicants by October 1, 1986 (L 1986, ch 276, § 37). Barrier's application for licensing as an importing transporter was received on October 6, 1986. In response to a question on that application, Barrier stated that it was at that time a registered distributor of motor fuel. The pre-printed Certification of Prepayment of Sales Tax (Form FT-935) used by Barrier stated that its New York motor fuel tax registration number was M-2207 (Barrier's canceled distributor registration number), while the Uniform Manifest carried by its driver in July 1988 showed an importing transporter number of T-5092 (Barrier's importing transporter number). Barrier filed motor fuel returns using its canceled registration number. Clearly, Barrier knew the difference between a distributor and an importing transporter.

After July 14, 1986, Barrier should have known that it could not import motor fuel into New York, while not being registered as a distributor. Effective July 14, 1986, Tax Law § 283.1 was amended by the Legislature. The pertinent portion of the amended provision states: "No person, unless so registered [as a distributor], shall import or cause any motor fuel to be imported into the state, for use, distribution, storage, or sale within the state or shall produce, refine, manufacture or compound motor fuel within the state" (L 1986, ch 276, § 2 [emphasis added]). The language of the statute is clear and unequivocal, and it is a truism that ignorance of a statute does not excuse conduct which violates the law. Moreover, Barrier's contention that it was misled by Ms. Cornell's and Mr. Abbott's letters into believing that it could continue to import motor fuel if it paid the New York State motor fuel and sales taxes to its out-of-state suppliers lacks credibility since Barrier never paid taxes to its out-of-state suppliers but continued to file motor fuel tax returns and pay taxes to New York, using its canceled New York registration number.

Barrier's conduct indicates that it was aware that it was acting as a motor fuel distributor while not registered to do so. Tax Law § 286-b (former [1]), as relevant here, provided as follows:

"the operator of a motor vehicle in which motor fuel is being transported in the state...must have in his possession a manifest which shows the name and address of the person from whom such motor fuel was received by him and the place of receipt of such motor fuel...and, if such motor fuel is being imported into the state in such...motor vehicle...for use, storage, distribution or sale in the state, the name of the distributor importing or causing such motor fuel to be imported into the state and such other information as the tax commission may require pursuant to rule or regulation".

The uniform manifest carried by Barrier's driver on July 1988 stated that the distributor of

the motor fuel was Citgo. Barrier must have known that it, not Citgo, was the importer and therefore the distributor of the subject motor fuel. It can only be concluded that Barrier was attempting to conceal this fact.

Barrier asserts that its own conduct was the result of confusion caused by ambiguous communications it received from the Division. There is a lack of candor in this argument. Surely, the Division's acceptance of Barrier's tax returns and the tax shown as due on those returns cannot be construed as acquiescence by the Division to the propriety of those returns (cf., Matter of Davies Lake Hotel, Tax Appeals Tribunal, January 20, 1989). Barrier's claim that stops of Barrier trucks made by Division investigators were part of a course of behavior by the Division which led to confusion about its registration status must be weighed against evidence that the uniform manifest and bills of lading carried by Barrier's driver in July 1988 were completed in such a manner as to conceal the fact that Barrier was the distributor and importer of the motor fuel. In this light, the failure of the Division investigators to detect irregularities in Barrier's operation cannot be accepted as evidence that the Division misled Barrier. It is somewhat more troubling that Barrier was granted an importing transporter license and registered as a petroleum business without any investigation or questions raised as to the veracity of Barrier's applications. Nonetheless, Barrier cannot use this as a basis for justifying its own conduct since its applications lacked veracity. The importing transporter application erroneously stated that Barrier was registered as a distributor and had never had that registration canceled, and the petroleum business application stated that Barrier's registration as a distributor was pending.

Even if it were found that Barrier was genuinely confused as to some of the requirements of the motor fuel tax law, that confusion would not excuse its conduct. The conduct which is at issue in this case is not the erroneous completion of applications or other forms. Barrier continued to do business as a motor fuel distributor without filing a bond, although it received a final decision from the State Tax Commission requiring it to file a \$400,000.00 bond as a condition of continued registration. Moreover, it continued to act, in every possible way, as a distributor of motor fuel for two years after its registration was canceled and 19 months after the Division threatened Barrier with civil and criminal penalties if it continued in its course of conduct. In fact, Barrier stopped importing motor fuel into New York only after one of its trucks was seized and one of its drivers was arrested on a felony complaint. To accept Barrier's defense of confusion under these circumstances would create an almost absolute bar to enforcement of the licensing and registration provisions of the motor fuel tax law. If Barrier was confused by communications it received from the Division, it should have inquired further.

Weighed against Barrier's circumvention of the registration and bonding requirements of the Tax Law is its apparent compliance with every other aspect of the Tax Law over a period of many years. There is no evidence that Barrier imported fuel into New York without paying the motor fuel and sales taxes due. In its 1986 decision the State Tax Commission stated: "Petitioner has an unblemished record of timely filing tax returns and paying tax due over the entire course of its existence. Petitioner has never been delinquent in filing or payment, nor are there any outstanding tax assessments against petitioner" (Matter of Barrier Oil Corporation, supra). Barrier argues that in light of its history as a taxpayer it would be inconsistent with the purposes of the motor fuel tax law to refuse to register it as a distributor. The heart of Barrier's position is the proposition that no damage resulted from Barrier's operation as an unregistered distributor because all taxes due to the State were paid. The fallacies in this argument are the reduction of the registration requirement to a technical formality and the failure to acknowledge the damage done to the State when its laws are ignored. The licensing and registration requirements are essential ingredients of the overall statutory scheme for enforcing the motor fuel tax law. The Tax Law has required the registration of distributors ever since a tax was imposed on motor fuel (L 1929, ch 364). Registration is a condition of doing business as a distributor (Tax Law § 283[1]). Filing a bond when requested to do so is a condition of doing

business as a distributor (Tax Law § 283[3]). It is not possible to allow Barrier to circumvent these requirements with impunity.

Refusing to register Barrier as a motor fuel distributor effectively prohibits it from importing gasoline into New York. It may continue to act as a wholesale supplier of gasoline by purchasing from registered distributors located in New York and paying the motor fuel excise taxes and sales taxes due to its suppliers. This is essentially the manner in which it has been operating since July 1988. In light of Barrier's history and past conduct, this sanction does not appear to be unfair.

G. The situation is different with regard to Barrier's application for registration as a diesel fuel distributor. Tax Law § 282-a(2) provides, in pertinent part:

"No person shall engage within this state in the enhancement of Diesel motor fuel, make a sale or use of Diesel motor fuel...[or] import or cause the importation of Diesel motor fuel into the state...unless such person shall be registered by the department of taxation and finance as a distributor of Diesel motor fuel." (As added by L 1988, ch 261, § 70, eff Sept 1, 1988.)

Without registration, Barrier cannot continue in business as a wholesale supplier of diesel motor fuel.

Barrier has been doing business as a diesel motor fuel distributor since 1972, and there is no evidence that Barrier ever failed to meet its obligations as such. The Division's only reason for refusing to register Barrier as a diesel motor fuel distributor is Barrier's conduct as a motor fuel distributor. Under many circumstances, this would be an adequate reason, but considering all of the facts and circumstances existing here, including the consequences to Barrier of a refusal to register, its filing and payment record, and the change in Barrier's corporate structure, a blanket refusal to register is too harsh a penalty to exact. Therefore, the Division is directed to register Barrier as a diesel motor fuel distributor, conditioned upon Barrier's filing of a surety bond in the amount of \$50,000.00.

H. Both the Division and Barrier offered evidence at this hearing regarding the amount of the bond which would be required from Barrier if registration as a motor fuel distributor were to be granted; however, the bond issue was not properly raised in this proceeding and will not be addressed here. Nothing in this determination precludes Barrier from reapplying for registration. Should the Division determine that registration is appropriate, it may calculate the bond requirement at that time. Of course, Barrier may challenge the amount of the bond requirement through the filing of a petition with the Division of Tax Appeals.

I. The petition of Barrier Oil Corporation is granted to the extent indicated in Conclusion of Law "G". In all other respects, the petition is denied and a notice of refusal to register as a motor fuel distributor may be issued immediately.

DATED: Troy, New York  
May 2, 1990

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE